

purchasing interconnection to do so in a space that is ten feet by ten feet.

U S WEST based its 100 square foot minimum floor space requirement on guidelines as to clearances required between the equipment bay and the surrounding enclosure. This was determined to be the smallest enclosable space practical and still maintain the working space around the typical equipment line-up (three bays, 30"wide x 8" deep each).⁸⁹ Furthermore, it is U S WEST's experience that 100 square feet will adequately accommodate equipment layouts for fiber or microwave equipment.

U S WEST's minimum 100 square foot requirement for EIC service is, obviously, neither overreaching nor unreasonable.⁹⁰ Rather, it provides the minimum amount of square footage that U S WEST considers reasonable and safe for the occupation of its property.

With regard to the established maximum square footage, i.e., 400 feet, a 400 square foot allowance more than adequately accommodates fiber or microwave interconnector requirements. Thus, U S WEST considers this to be a reasonable maximum square footage requirement for initial interconnection occupation.

U S WEST feels that our maximum square footage limitation protects U S WEST's own abilities to offer service and actually

⁸⁹Lincoln Telephone's experience would support U S WEST's determinations. See Investigation Order at 20 ¶ 32 and n.97.

⁹⁰Additionally, it should be noted that U S WEST's EIC Tariff minimum space requirements emulate provisions that are consistent with increments of rental space offerings found in commercial real estate markets.

fosters competition, assuring space to multiple interconnectors in any given central office. Through this square footage limitation, U S WEST retains the ability to ensure that the interconnector is leasing space for current equipment needs and not warehousing space for future needs.⁹¹ It provides U S WEST with the opportunity to retain limited proprietary control over our property for the provision of our own non-EIC services and for the provision of services by other interconnectors desirous of providing services from leased physical spaces.

This is particularly important given the Commission's recently-announced initiatives regarding switched EIC -- an action that can reasonably be expected to produce a new raft of potential interconnectors. With no maximum space limitation, the first interconnector to occupy a U S WEST central office could control and restrict competition from other interconnectors for collocation within the same U S WEST central office.

U S WEST does not deem it appropriate, therefore, to increase our maximum square footage requirements, at this time. Over time, and with experience, U S WEST may determine that neither minimum nor maximum space requirements are necessary. However, until we have had a reasonable opportunity to understand the market realities of EIC service, the configuration of our EIC tariffs is demonstrably reasonable.

⁹¹As discussed more fully below, even at this level, an interconnector "efficiently using" its space will be able to hold substantial leased physical space. See pp. 86-90, infra.

Square Footage Requirements for Expansion

U S WEST's EIC Tariff does not set minimum square footage requirements, per se, with regard to requests for additional space. Additional contiguous space can be added in any increment that an interconnector desires, provided contiguous space is available.⁹² However, additional non-contiguous space would be required to be at a minimum of 100 square feet.

2. Service Order Processing for Additional Space: "LECs should describe how they will treat orders for additional space. LECs that treat such orders as new orders requiring repetition of the entire ordering process should explain why such orders cannot be processed as an addendum to the original agreement with

⁹²The interconnector will be charged a nonrecurring charge for a minimum 100 square feet (see U S WEST's EIC Tariff at § 21.8.3(A)(Original Page 21-51.1)); but will be charged on a recurring basis only for the square footage actually occupied.

U S WEST originally had proposed that EIC charges be done on an Individual Case Basis ("ICB"). Had U S WEST's originally proposed tariff structure been permitted to go into effect, U S WEST (and the interconnector) would have had more flexibility in ordering/billing options. However, U S WEST was compelled to change that structure. In essence, we were advised by the Bureau that "negotiated rates" were not appropriate for EIC service. If the Bureau is now of a different opinion, U S WEST would be interested in reverting to ICB rates -- however our established minimum and maximum space requirements would not change for initial EIC occupancy.

Having been mandated to establish standard rates, U S WEST's "standard rates" for leased physical space "Hard Wall Enclosure Buildout" establish ordering/billing limits for space up to 100 square feet, from 101 to 200 square feet, from 201 to 300 square feet, from 301 to 400 square feet. These provisions apply regardless of whether the space being ordered is with regard to an interconnector's original occupancy or its request for additional space.

a simplified procedure and correspondingly lower NRC."⁹³

U S WEST treats all requests for additional EIC space (whether contiguous or not) as new orders, applying all applicable nonrecurring charges. From U S WEST's perspective, the request for additional space is no different than the request for initial EIC service. It requires that U S WEST undertake all the same processes (e.g., preparing the quote, redesigning the space, adding more cable for new power requirements, modifying cable racking to accommodate new fiber requirements) that we must undertake for the initial occupancy. Thus, it is reasonable for U S WEST to process requests for additional space in the same manner we do orders for initial space.

To allow an order for additional space to be treated as an addendum to the original agreement with a simplified procedure and a correspondingly lower nonrecurring charge, could only be accomplished on an interconnector-specific request basis. Modifications associated with ordering additional space may require at or near the same level of activities associated with building a new space. But until actual requests for additional space are received, these modifications are unknown. Thus, U S WEST's tariff does not currently accommodate subsequent changes with lower nonrecurring charges.

⁹³Investigation Order at 21, Item (c). U S WEST is not herein responding to Investigation Order at 21, Item (b). That item of inquiry is LEC specific and U S WEST was not identified as an appropriate respondent.

Given U S WEST's rate structure, it is clearly advantageous for the interconnector to know its business and its business needs upon its initial entry into our central office.⁹⁴ But, this is hardly an unreasonable requirement. It is certainly not U S WEST's responsibility to "cover" EIC service set-up charges, nor to treat the costs associated with processing additional orders for EIC space as though the requests were not processed separately, at different times and involving different central office geographies.⁹⁵

3. Contiguous Space Provisioning: "LECs should specify their policies regarding provision of contiguous space for expansion and direct cabling between noncontiguous spaces and state why these policies are reasonable. . . . US West [sic] and any other LEC whose tariff language seems to prohibit augmentation of the existing enclosure where contiguous additional space is provided, and instead requires the existing enclosure be removed and a new one constructed, should explain why such a policy is reasonable. If the LEC does not intend this result, it should explain its intent and specify how it will revise its tariff to make that intent clear."⁹⁶

U S WEST does not require any specific square footage requirements to add contiguous space.⁹⁷ As we have indicated

⁹⁴See U S WEST's EIC Tariff at § 21.8.3(A) (Original Page 21-51.4).

⁹⁵An initial request might be processed at a point where there is but one or two interconnectors. A request for additional space might be processed when there are 12 interconnectors occupying U S WEST's central office.

⁹⁶Investigation Order at 21-22, Item (d).

⁹⁷But see note 92, supra.

previously,⁹⁸ we will make every effort to work with interconnectors to provide contiguous space. However, that effort will be defined and informed by the central office architectural geography at the time the request for contiguous space is made.

Depending on the demand for EIC service (which will increase we believe with the implementation of switched EIC), it may be that interconnectors will have large spaces separating them from each other. In such circumstances, adding contiguous space to accommodate for growth will not present a problem. On the other hand, a central office may have interconnectors closely quartered, in which case a request for contiguous space may not be able to be accommodated.

If contiguous space is not available, it is possible that "additional" non-contiguous space may be. In those circumstances, where a single interconnector is required to have two leased physical spaces separated by space, U S WEST will permit the interconnector to directly cable between its two leased physical spaces.⁹⁹ All applicable nonrecurring charges to provide the cabling (e.g., riser, fiber placement, enclosure buildout, -48 volt DC power cable installation and inspector charges (if the interconnector self-provisions the fiber placement)) would be charged to the interconnector.

⁹⁸See U S WEST Reply at 62-64.

⁹⁹This would accommodate the concern raised by MFS and inquired about herein by the Bureau. See Investigation Order at 20 ¶ 34 and n.101.

When an interconnector requests contiguous space, and such space can be provided, it is U S WEST's intention to reuse as much of the existing enclosure and equipment as is reasonable to accomplish the provisioning of the additional space. U S WEST does not intend to completely demolish the existing enclosure, but will only dismantle and remove those walls or construction items that are necessary to accommodate the additional requested floor space.

U S WEST will modify its tariff language at U S WEST's EIC Tariff §§ 21.4.1.6 and 21.4.2 to read: "Enclosure Buildout charges will apply to construct the new enclosure and to remove only those portions of the existing leased physical space enclosures necessary to accommodate the request for contiguous space."

- D. "Are LECs tariff prohibitions against expanded interconnection with dark fiber service consistent with the Special Access Order?"¹⁰⁰

"Bell Atlantic, BellSouth, SWB, and US West [sic] (the only LECs currently required to provide dark fiber service) should specify whether their expanded interconnection tariffs prohibit or permit a collocater to cross-connect to LEC-provided dark fiber service in the same way in which an interconnector would cross-connect to LEC-provided DS1 or DS3 service. LECs arguing that they are not required to provide interconnection to dark fiber service in this manner should explain whether this is consistent with the Commission's statements in the Special Access Order and other proceedings."¹⁰¹

¹⁰⁰Id. at 22.

¹⁰¹Id. at 22-23, Item (a).

While the Bureau specifically excludes the issue of "whether LECs are required to terminate their dark fiber offerings directly at an interconnector's collocated space without the use of a cross-connect element,"¹⁰² it seeks clarification regarding whether certain "tariffs prohibit or permit a collocator to cross-connect to LEC-provided dark fiber service in the same way in which an interconnector would cross-connect to LEC-provided DS1 or DS3 service."¹⁰³

U S WEST will not permit dark fiber EIC under our tariff,¹⁰⁴ whether directly terminated or whether accessed via a cross-connect. U S WEST's dark fiber service offering is only provided between two customer premises.¹⁰⁵ The customer provides the terminating equipment, such as regenerators or electronics, which are required to convert the dark fiber into a usable transmission path for communications transport.

U S WEST will not permit a direct termination because, under our tariff, the interconnector's leased physical space is not a "customer premises."¹⁰⁶ We will not permit the termination of a dark fiber service via a cross-connect, because that theory seeks

¹⁰²Id. at 23 n.111.

¹⁰³Id. at 22, Item (a).

¹⁰⁴See U S WEST EIC Tariff § 21.4.2(k).

¹⁰⁵See U S WEST F.C.C. Tariff No. 1 at § 18.1.

¹⁰⁶See id. at § 41.4.2(K).

to convert our central office to a "customer premises," which it is not.¹⁰⁷

The Bureau's inquiry suggests that it might deem it appropriate for those LECs offering dark fiber services to extend or expand their current dark fiber services. U S WEST is unwilling to do this. As the Bureau is aware, U S WEST does not want to be in the dark fiber business.¹⁰⁸ Our position has been plainly stated: dark fiber is not a service but a raw facility and U S WEST is not in the facility-provisioning business.

Furthermore, dark fiber lacks alarm surveillance, performance monitoring and test capability, all features vitally important to the success of EIC services. Other emerging fiber based services, such as SONET and broadband services, are more appropriate for such provisioning and are totally within the spirit of the Commission's Special Access Order.

- E. "Do the LECs' tariffs prevent interconnector control over channel assignment on the interconnectors' networks and, if so, is such an arrangement reasonable?"¹⁰⁹

¹⁰⁷The theory associated with this suggestion is that, as the dark fiber passes through our central office (connecting two customer premises -- one at each end), the interconnector would cross-connect at the pass-through point, to its leased physical space. Our central office is not a "terminating customer premise" for dark fiber offerings, any more than an interconnector's leased physical space is.

¹⁰⁸See Nos. 91-1416, et al., Southwestern Bell Tel. Co., et al. v. F.C.C. (D.C. Cir. Aug. 27, 1991).

¹⁰⁹Investigation Order at 23.

1. "LECs that contend they permit interconnectors to control their own channel assignments should explain to what point they maintain control of channel assignment on the LEC's network, and how this enables an interconnector to control channel assignment on the interconnector's network. LECs should provide a diagram illustrating this process."¹¹⁰
2. "Ameritech, NYNEX, GTE, and any other LEC that appears to maintain control of channel assignment to the point of termination should identify specifically where the point of termination is (e.g., POT bay, LEC MDF) and whether this deprives interconnectors of control over channel assignment on the interconnector's network. If the point of termination is between the LEC MDF and the interconnector's equipment, LECs should specifically address the claim that such a point of termination deprives an interconnector of control over channel assignments on the interconnector's network. LECs should provide a diagram illustrating this process."¹¹¹

U S WEST retains the right to channel assignment control to the point of interconnection at the U S WEST DSX. This point of interconnection does not deprive the interconnector of control over channel assignment on the interconnector's network; nor does U S WEST have control over how the interconnector assigns channels on its network.

U S WEST places a cross-connect panel (i.e., a DSX) in the interconnector's leased space.¹¹² A cross-connect jumper connects the USWC DSX panel to the customer's DSX panel. The interconnector has control over their jumper on the DSX and the

¹¹⁰Id. at 24, Item (a).

¹¹¹Id. at Item (b).

¹¹²The reasons for the use of a LEC-provided DSX are discussed above at II.A.2(d)(3).

ability to change jumper location at any time, thereby controlling the channel assignment on its network.

The implications raised by the Bureau's inquiry, i.e., that an interconnector might need direct access to a LEC's MDF in order to have channel assignment control and flexibility are incorrect. The intermediate DSX equipment does not deprive an interconnector of channel assignment control.

At the DSX, an interconnector can make any channel assignment it wishes, when it attaches its cable to the interconnector side of the DSX. At that point, the channel is assigned. To change a channel assignment, the interconnector must manually untie the cable connection. This requires interconnector labor and puts certain stress on the cable.

To avoid both, apparently, interconnectors want the LECs to provide the labor associated with channel assignment changes. These interconnectors suggest that they be permitted to terminate their cable directly onto a LEC's MDF, rather than having to terminate such cable on a intermediate DSX, despite the fact that the DSX provides certain quality control functions for the LEC's provision of EIC service.

The testing and monitoring capabilities of the DSX are critical to quickly and easily determine the source of a network problem with minimal disruption to service; and to identify whether the LEC or interconnector is responsible for correcting the problem. These important functions are simply not available on a LEC MDF.

Interconnectors who complain that they lack channel assignment flexibility because they do not have channel control to the LEC's MDF are being disingenuous. Rather, they seek to appropriate U S WEST's labor and materials for their own purposes and their own service offering. Rather than taking responsibility for doing the physical activity associated with changing channel assignments, these interconnectors would presume to advise U S WEST's employees -- as some kind of indentured "agents" -- what to do and how to do it, all at U S WEST's expense!

If an interconnector wishes to avoid either the burden of changing channel assignments directly on the DSX, the interconnector (via its own network design and investment) can install its own distributing frame on the interconnector's side of the DSX. By putting in this relatively inexpensive piece of equipment, the interconnector could have the same flexibility in channel assignments as it could have by meeting U S WEST at U S WEST's MDF.

F. "Are the LECs' provisions regarding warehousing or efficient use of space reasonable?"¹¹³

1. "LECs that regulate the amount of floor space items such as ancillary equipment or file cabinets may occupy in an interconnector's cage should explain why they believe such regulation is reasonable and under what circumstances violation of such a limit should trigger eviction. In addition, assuming arguendo that such limitations are reasonable, LECs should address whether an interconnector should be evicted for violating such

¹¹³Investigation Order at 24.

a provision if: (1) it is operational and space for additional interconnectors is available; (2) it is operational and space for additional interconnectors is not available; (3) it is not operational and space for additional interconnectors is available; and (4) it is not operational and space for additional interconnectors is not available."¹¹⁴

2. "LECs that refuse to rent additional space to an existing interconnector on the grounds that the interconnector has not efficiently used its initial interconnection space should explain on what basis they will make this determination and whether such provision is reasonable, particularly where there is still space for additional interconnectors."¹¹⁵

The Commission recognized in its Expanded Interconnection Order that LECs would be permitted "to include in their tariffs reasonable restrictions on warehousing of unused space by interconnectors."¹¹⁶ U S WEST has done just that. Through the establishment of a maximum square footage requirement, and an "efficient use" requirement, U S WEST can assure space not needed for EIC service is available to itself for the provision of other non-EIC services and that additional EIC space will be available for future purchasers.¹¹⁷

U S WEST's EIC Tariff defines "efficiently used" as requiring that "substantially all of the floor space. . .is taken up by the equipment" specified in the Telephone Company's

¹¹⁴Id. at 26, Item (a).

¹¹⁵Id. at 26, Item (c).

¹¹⁶7 FCC Rcd. at 7408 ¶ 80.

¹¹⁷This is ever more important given the Commission's recent initiatives regarding switched EIC. Arguably, there will be increasing demand for interconnection and collocation.

tariffs, and that "no more that 50% [of the floor space] is used for storage cabinets and work surfaces."¹¹⁸ While a number of petitioners,¹¹⁹ take issue with U S WEST's requirement that an interconnector must "efficiently use" its EIC space, none of them can demonstrate any real or immediate adverse impact to them with regard to such requirements.

On the other hand, certain demonstrable results can be predicted without such an "efficient use" requirement. When U S WEST's maximum 400 square foot requirement for initial EIC service is combined with our "efficient use" requirement, the practical result is that an interconnector occupying 400 square foot can hold 200 of it immediately for future growth.

Holding that additional 200 feet, however, does have certain consequences to other potential purchasers of EIC service, as well as to U S WEST as a non-EIC service provider. It renders that space "unavailable."¹²⁰

U S WEST is more than willing to work with interconnectors on EIC offerings. In some central offices, space will be at a premium and efficient use requirements a necessity. In others, that may not be the case.

¹¹⁸See U S WEST EIC Tariff at § 21.4.1.6(C).

¹¹⁹See e.g., Telecommunications Users Committee ("Ad Hoc") at iv, 31-33; ALTS at App. D (U S WEST), p. 7; TDL at 7; TCG at App. A, Item 20, p. 2.

¹²⁰An entity purchasing EIC service at the 400 square foot level, and "holding" 200 square feet for future growth, potentially deprives two other interconnectors of 100 square foot space, as well as depriving U S WEST of 200 square footage of its own central office space.

On the other hand, U S WEST's establishment of "efficient use" requirements does not mean that we intend to evict an interconnector from its EIC space if it is not "efficiently" utilizing its space and that fact is not material to U S WEST's EIC or other offerings to others. Indeed, our EIC Tariff makes that clear: "If leased physical space is needed to accommodate another interconnector's or the Telephone Company's service, the Telephone Company may take back from the interconnector, leased physical space that is not being "efficiently used."¹²¹ And, given the way that U S WEST has defined "material breach" with regard to the EIC offering, an interconnector inefficiently using its space but not affecting any other interconnector or U S WEST's own ability to offer services, would be in no danger of having its service terminated.

Under such an analysis, for example, and utilizing the Bureau's scenarios as described above, possibilities (2) and (4)¹²² would constitute grounds for U S WEST to reclaim the EIC space; while items (1) and (3) would not.¹²³ This is certainly a reasonable outcome and U S WEST's EIC Tariff provisions and our "efficient use" requirements should be sustained.

In our tariff, U S WEST states that additional space will be provided on an "as requested" basis, where feasible, if the

¹²¹U S WEST EIC Tariff at § 21.4.1.6(B) (emphasis added).

¹²²See Investigation Order at 26, Item (a)(2), (4).

¹²³Id. at (1), (3).

interconnector's existing space is being "efficiently used."¹²⁴

In keeping with the Commission's realization that reasonable restrictions on warehousing are permissible and necessary,¹²⁵

U S WEST feels it would be unreasonable -- not only to U S WEST but to existing and future interconnectors wanting space in U S WEST's offices -- to provide additional space to existing interconnectors who are not efficiently using the space they already have. To grant additional space to such interconnectors would facilitate the exhaustion of limited physical interconnection space in central offices. It might also limit space for existing or potential interconnectors, who may desperately need the space.

3. "LECs that set a time limit within which an interconnector must become operational should explain why such regulation is reasonable, the minimum time period within which it is reasonable to direct an interconnector to become operational, and under what circumstances should violation of such regulation trigger eviction. For example, if space for additional interconnectors is available, it is reasonable to require current interconnectors to become operational or lose their space?"¹²⁶

- G. "Are the LECs' provisions regarding notice to or from interconnectors in the event of service termination reasonable?"¹²⁷

¹²⁴U S WEST EIC Tariff at § 21.4.1.6(A).

¹²⁵See note 116, supra.

¹²⁶Investigation Order at Item (b).

¹²⁷Id. at 26(G).

1. "LECs should specify the notice period their tariffs provide for notifying interconnectors of the LEC's intention to terminate the interconnection arrangement. LECs should explain why they consider this to be a reasonable notice period."¹²⁸

The interconnection term under U S WEST's EIC Tariff is month-to-month. Should the interconnector not be in compliance with U S WEST's EIC Tariff provisions, a general 30-day notice provision would apply.¹²⁹

The three circumstances in which U S WEST envisions that an interconnection arrangement might need to be terminated are: (1) U S WEST needs to reclaim its property¹³⁰ in which case six months notice will be provided; (2) a catastrophe occurs which interferes with U S WEST's ability to provide EIC service, in which case the provisions of U S WEST's EIC Tariff regarding catastrophes (and the attendant notification provisions) would

¹²⁸Id. at 27, Item (a).

¹²⁹See U S WEST Tariff F.C.C. No. 1 at § 2.1.8(B)(1). This notice provision provides that U S WEST can notify the interconnector of "noncompliance, refuse additional applications for service, refuse to complete any pending orders for service or discontinue existing service of the noncomplying customer at any time thereafter." U S WEST can, therefore, discontinue the Expanded Interconnection Channel Termination ("EICT") portion of EIC service under this provision (or refuse to process new or additional orders). However, before U S WEST can move to reoccupy its real property (under § 2.1.8(B)(5)), the interconnector would have to be in "material breach" (which would include non-payment for any U S WEST tariffed service), and would be given a 30-day opportunity to cure the breach.

¹³⁰See id. at § 21.4.1(H).

come into play;¹³¹ and (3) if the interconnector is in material breach and has failed to cure the breach.¹³² Should a curing of the breach not occur, U S WEST could demand vacation of the premises immediately after the passage of 30 days. All of U S WEST's provisions are reasonable.

2. "LECs should specify the notice period contained in their tariffs within which an interconnector must notify the LEC of the interconnector's intent to terminate the interconnection arrangement. LECs should explain why they consider this to be a reasonable notice period."¹³³

U S WEST's EIC Tariff currently contains a requirement that interconnectors provide U S WEST with notification of an intention to vacate the leased physical space at least 90 days before leaving.¹³⁴ Since U S WEST's EIC Tariff is modeled on a month-to-month service offering, this requirement was established primarily to aid U S WEST in space planning, both for its own -- and other interconnectors' -- needs.

U S WEST believes that its requested notification requirement is reasonable, and works to the overall best interests of all potential purchasers of EIC service. However,

¹³¹See U S WEST Tariff F.C.C. No. 1 at § 2.1.3(D). The "notice" provisions found therein are advisory in nature (*i.e.*, U S WEST's plans for rebuilding the affected space). Notice is to be provided within 45 days.

¹³²See U S WEST Tariff F.C.C. No. 1 at § 2.1.8(B)(5).

¹³³Investigation Order at 27-28, Item (b).

¹³⁴See U S WEST EIC Tariff at § 21.4.1(I). Originally, this provision required 180-days notice, but was changed as the result of concerns expressed in certain Petitions to Reject/Suspend.

we would be agreeable to further revising the language of this tariff section such that it is "suggested" or "advisory" in nature, rather than precatory, should the Bureau so desire.

3. "LEC[s] should justify any differences in length between the notice periods they specified in (a) and (b) above."¹³⁵

The justification that the Bureau seeks is found in the text of the discussion under the items above.

- H. "Are the LECs' provisions permitting them to terminate a collocation arrangement reasonable?"¹³⁶

As discussed above,¹³⁷ U S WEST has reserved to itself the right to terminate EIC service (1) should U S WEST need to retain our property; (2) for a material breach of tariff obligations; and (3), in certain circumstances, for catastrophic events. The Bureau inquires specifically below about items (2) and (3); and item (1) is addressed below at Section II. I.

1. "LECs whose tariffs permit them to discontinue service for any violation of the tariff should explain why they believe such provisions are reasonable, and why they should not be limited to discontinuing a collocator's service only for violations of material tariff terms. LECs should also define what they consider to be material tariff terms."¹³⁸

¹³⁵Investigation Order at 28, Item (c).

¹³⁶Id. at 28(H).

¹³⁷See Section G, generally, supra.

¹³⁸Investigation Order at 29, Item (a).

U S WEST's original EIC Tariff allowed it to terminate EIC service for the violation of any U S WEST Tariff provision.¹³⁹ Upon termination, U S WEST would have had the right to terminate both the EICT aspect of EIC service¹⁴⁰ and the physical occupation aspect (i.e., collocation) of the service.

Subsequently, U S WEST agreed to exercise our rights to reoccupation/repossession of the leased physical space only upon the happening of a material breach.¹⁴¹ While a "material breach" would include the non-payment "of any EIC charges due and owing, or any other charges owed U S WEST for other services,"¹⁴² it would not include the violation of general terms and conditions associated with services other than EIC service. The end result is that an interconnector who is in violation of any U S WEST Tariff provision may have its EICT service disconnected (and may have requests for future orders refused), but it will not be required to vacate the leased physical space (i.e., the real property) unless it is in material breach.

For the Bureau's ease of reference, U S WEST herein recites, in full, the text of our material breach provisions:

¹³⁹See U S WEST Transmittal No. 331, at § 2.1.8(B)(5), on original page 2-8.4.

¹⁴⁰See U S WEST Tariff F.C.C. No. 1 at § 2.1.8(B)(1).

¹⁴¹See id. at § 2.1.8(B)(5).

¹⁴²Id.

A material breach would include: non-payment of any EIC charges due and owing, or any other charges owed U S WEST for other services; a failure to perform or observe any of the EIC Tariff provisions, other than those pertaining to payment for service; a situation where the right to use the EIC leased physical space (or any part thereof) is taken on behalf of a third party upon execution or by other process of law directed against the interconnector, or is taken upon or subject to any attachment or lien (other than that imposed by the Telephone Company herein) at the instance of any creditor of, or claimant against, the interconnector; a situation where an interconnector becomes insolvent or applies for or consents to or acquiesces in the appointment of a receiver, trustee or liquidator with regard to all or a substantial portion of interconnector's leased physical space, or files a voluntary petition for bankruptcy, reorganization or insolvency; or the entry of a court order, judgment or decree without the application, approval or consent of an interconnector, approving a petition seeking reorganization of the interconnector under any bankruptcy or insolvency law or appointing a receiver, trustee or liquidator of interconnector's property or the interconnector's leased physical space, or adjudicating the interconnector as bankrupt or insolvent.¹⁴³

As can be seen, most of the actions that would constitute a "material breach" are particularly directed to the EIC service itself (and the interconnectors' occupancy of the real estate and its placement of personal property/fixtures in/on that real estate). One item, however, remains that applies to all tariffed services: payment. An interconnector will be in material breach with regard to EIC service if the interconnector is in default of its payment obligations with regard to any other tariffed service it purchases from U S WEST. This is certainly reasonable, as U S

¹⁴³Id.

WEST should not be required to provide one tariffed service to an interconnector who refuses to pay for another.

With regard to U S WEST's right of reoccupancy itself, such right to re-occupy is the physical, tangible, real estate equivalent to "disconnection" of telephone/access service.¹⁴⁴ This provision allows U S WEST, in conjunction with the general discontinuance of service provisions, to treat an interconnector in breach of its EIC Tariff in a holistic and meaningful manner: it can "discontinue" the EICT (i.e., the "telecommunications" service) and can require the interconnector to quit the property or premises (vacate the real estate).

In the absence of such a provision, U S WEST could well be faced with interconnectors who refuse to pay for service, or become insolvent, thereby becoming squatters in U S WEST central offices. U S WEST might well have the authority to terminate their EICTs, but we would have to go to court to "evict" the bad-acting interconnector. U S WEST has been advised by legal counsel that putting the company in such a position would be unreasonable and irresponsible.

It is common practice for those allowing others to occupy their real estate, for the offeror of the service to retain certain self-help remedies. By doing so, the "landlord" retains

¹⁴⁴Compare In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22, RM-7990, Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd. 2331, 2333 ¶ 11 (1993) ("Termination provisions and procedures are typically contained in the tariff . . . under which a common carrier provides service.").

certain property rights, which allow later expense savings. For example, long, drawn-out court proceedings are avoided.

U S WEST's re-occupancy provision is both a prudent and appropriate term and condition for a service provider providing both intangible and tangible services in an "integrated" offering, especially one providing the "tangible" portion of the offering under compulsion.¹⁴⁵

2. "Parties claiming that the LECs may unreasonably discontinue service for any tariff violation should indicate the types of violations they believe warrant discontinuance, and should specify the particular LECs' provisions they do not believe warrant such a sanction. Interested parties should also comment on US West's [sic] provision deeming the levying of a tax lien on an interconnector's operations, occupancy, or personal property to be a material breach triggering US West's [sic] right of reoccupancy/repossession. Parties supporting existing tariff provisions should explain why they believe that those violations warrant termination."¹⁴⁶

U S WEST's EIC Tariff currently makes non-payment of taxes a "violation" of EIC service.¹⁴⁷ U S WEST is aware that the Bureau has some concerns about this provision.

Upon inquiry from the Bureau staff regarding U S WEST's tax provision, we clarified that we did not intend to put ourselves in the position of tax collectors. Rather, the tariff provision

¹⁴⁵Should the Commission's Expanded Interconnection Order be reversed, U S WEST wants the ability to reclaim its property (should it determine that appropriate) as quickly, and with as little fuss, as possible.

¹⁴⁶Investigation Order at 29, Item (b).

¹⁴⁷See U S WEST Tariff F.C.C. No. 1 at § 2.3.1(D).

was meant to operate in a prophylactic capacity: if an interconnector did pay all relevant taxes, there would be no tax lien on the interconnector's property. It was the absence of a tax lien that was important to U S WEST, not the payment of taxes per se.

In an attempt to allay the Bureau's concerns, U S WEST agreed with the Bureau staff to amend that tariff section such that our intentions were clear: U S WEST was not interested in being a "tax collector," but in assuring that a tax lien was not levied on the property of the interconnector within our central office. If such a lien were levied, U S WEST would consider such action to be a "material breach." Subsequently, U S WEST did amend this tariff provision.

U S WEST's provision that the assessment of a tax lien would constitute a material breach is eminently reasonable. No other "class" of customer -- other than "interconnectors" -- would be in a position to have property on a LEC premises that might be subject to a tax (or other kind of) lien.¹⁴⁸ No private owner of property should have to suffer such an intrusion. U S WEST should not be required to house equipment of an interconnector

¹⁴⁸Whether or not the law would actually allow for an execution of a lien on an interconnector's "non-exclusive right to use" U S WEST's real estate, or a lien placed on the interconnector's personal property and/or fixtures, is not the point. Any lien that is imposed on either the interconnector's limited interest in U S WEST's property or the tangible property located in U S WEST's central office (whether or not it is later determined to be valid) should provide grounds for U S WEST to require the interconnector to vacate. U S WEST should not be required to be a silent -- though affected -- party to a dispute between the interconnector and some alien third party.

that is encumbered with "rights" of third parties who are strangers to the fundamental EIC service.

Furthermore, in certain circumstances the existence of liens affords those who are strangers to the EIC arrangement with certain rights to the property of the interconnector -- rights that U S WEST has attempted to reserve to itself through its equipment lien provision. Our tariff/contractual rights are potentially diminished. U S WEST should not be put in such a situation without affording us the opportunity to demand that the interconnector quit and vacate the premises or cure (pay off) the lien.

Despite the legitimacy of U S WEST's tax provision, U S WEST is agreeable to removing it. We will amend our "material breach" provision to provide that a lien (of any type -- both on the personal property of the interconnector as well as on "the right to use the EIC leased physical space") constitutes a material breach, triggering our right to reoccupancy. How the lien got there (non-payment of taxes, etc.) will be irrelevant.

3. "Interested parties should describe the condition, if any, under which interconnectors should be charged for termination of the collocation arrangement."¹⁴⁹

U S WEST's EIC Tariff is a month-to-month service, with no particular "termination charge" if the interconnector has terminated service within the monthly term. While other arrangements might be reasonable, as well, U S WEST chose our

¹⁴⁹Investigation Order at 29-30, Item (c).